

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002



Date Issued: April 20, 1999

Case No.: 1997-INA-0029

In the Matter of:

INCREDIBLE FEATURES, INC.,
Employer,

On behalf of

ROSALINA ADEA VILLARIN INGLES,
Alien.

Certifying Officer: Rebecca Marsh Day, Region IX

Appearance: Jack Golan, Esq.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

An application was filed by Incredible Features, Inc. on January 26, 1995, seeking labor certification for the position of "Bookkeeper/Full Charge" for Rosalina Adea Villarin Ingles, Alien. The duties of the job were described as follows:

Maintain records and financial information for Management to show statistics and other items pertaining to the operation of the business. He/she will: analyze and reconcile accounts; verify and record details of transactions to reflect status of accounts, invoices, sales records, inventory records and requisitions; maintain and prepare records of accounts payable and receivable, trial balances; profit and loss statements, payroll and payroll taxes, bank reconciliation by use of computer and accounting software such as Lotus 123, Windows, calculate employee's wages, withholdings, Social Security and other taxable deductions.

Employer required that applicants have completed high school and have two years of experience in the job offered.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on April 24, 1996 (AF 35-38). The CO stated that it appears that Employer did not recruit U.S. applicant Steven Harris Garrigan in good faith by failing to contact him in a timely manner and rejected him for other than lawful job-related reasons. The CO instructed Employer to document with specificity the lawful job-related reasons for rejecting Mr. Garrigan, how the job was clearly open to Mr. Garrigan and how Employer engaged in good faith recruitment of this applicant.

Employer, by counsel, submitted rebuttal on May 28, 1996 (AF 28-34). Counsel stated that Mr. Steven Harris Garrigan was not invited for an interview on the basis of his resume, that there was no reason to believe that he is qualified for the job; that his four years of experience as General Manager/ Marketing Director of a pizza restaurant which included responsibility and supervision of eight areas of work, including accounting, does not qualify him for a position as a Bookkeeper. Employer stated that Mr. Garrigan does not claim any hands-on experience in

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

bookkeeping, accounting or payroll activities, or to have posted debits and credits in daily journals, or to have reconciled accounts or prepared and filed tax returns.

The CO issued a Final Determination denying certification on June 17, 1996. The CO stated that Mr. Garrigan's resume indicates that from March 1991 to February 1995, he was employed as General Manager/Marketing Director for Mama's Original Pizza & Pasta restaurant and that during this employment he controlled all aspects of the corporation including operations, catering and banquet service, sales, special events coordination, purchasing and accounting including payroll. The CO stated further that this experience indicates a level of knowledge and experience more intensive than mere bookkeeping; that Employer rejected this applicant without making a good faith effort to investigate his credentials. The CO concluded that Employer had not recruited Mr. Garrigan in good faith, had rejected him for other than lawful job-related reasons and had failed to demonstrate that the job opportunity was clearly open to this U.S. worker at the time of initial referral.

Employer, by counsel, requested administrative-judicial review of the denial on July 19, 1996 and filed a brief in support of its appeal on November 19, 1996 (AF 1-2).

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 CFR § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has lawful job-related reasons for rejecting U.S. applicants and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

The offered job is for a bookkeeper and it involves performing bookkeeping duties; ie: analyze and reconcile accounts, verify and record details of transactions, maintain and prepare records of accounts payable and receivable, prepare trial balances, profit and loss statements, payroll and payroll taxes and deductions, and reconcile bank accounts using a computer and accounting software.

Applicant Garrigan's resume does not specifically demonstrate any actual experience as a bookkeeper. Further, Mr. Garrigan's career objective is to obtain a responsible management position in the fields of corporate retail and hospitality management, publishing, marketing, advertising or graphic arts (AF 62). However, his past experience includes managing two pizza restaurants where he controlled hiring, marketing, advertising, special events, purchasing and accounting including payroll; working for an advertising agency where he did media buying, direct

mail marketing, special events coordination, market and business analysis and operations consulting; editor for a weekly news magazine; and manager positions with an oil company, a food store and a grocery store (AF 62). Clearly Mr. Garrigan has some experience overseeing the accounting and payroll operations of a pizza restaurant. What is not clear is whether he has the experience or knowledge to actually perform the day to day bookkeeping duties of the offered job. However, it is precisely this ambiguity which is dispositive in this case.

Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant meets the requirements, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating (by an interview or otherwise) to determine whether the applicant meets all of the requirements. *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*).

An Employer who rejects an applicant without investigating (by an interview or otherwise) to determine whether the applicant meets all of the requirements risks a finding that there is a reasonable possibility that the applicant meets the requirements. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

We are of the opinion that the resume of Mr. Garrigan, which indicates experience supervising and hiring individuals who perform the duties of the job offered, raises at least a reasonable possibility that he meets the requirements. Therefore, this Employer should not have stopped short of fully investigating the applicant's qualifications.

Accordingly, we find that the Employer has failed to establish that Mr. Garrigan was rejected for lawful job-related reasons, and the denial of labor certification must be affirmed.

ORDER

The denial of labor certification is **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk

***Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.